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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

HOWARD W. EMERY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari From The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. The Jurisdiction of the United States as conferred by the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403 to regulate the navigable waters of the United States extends to the entire surface of a navigable body which shall include all of the land and water below the ordinary high water mark of such surface or bed, however, may be limited by permitted manmade structures such as dikes.

II. The Jurisdiction of the United States as conferred by the Clean Water Act, 33 U.S.C. 1311, 1319, and 1334, to regulate the waters of the United States does not extend to wetlands which constitute prior converted crop lands.

III. A structure which is permitted pursuant to the Rivers and Harbor Act of 1899, 33 U.S.C. 403 and the Clean Water Act, 33 U.S.C. 1311, 1319, and 1334, may be repaired or rehabilitated without the necessity of obtaining the permission of the United States Government, if such structure is providing the service for which it was intended.

IV. The denial by the United States Government of a land owner's request to rehabilitate or reconstruct a structure located within the waters of the United States which had previously been permitted, constitutes a taking of the land owner's property without due process of law and therefore is in violation of the Fifth Amendment to the United States Constitution.

LIST OF PARTIES

The names of all Parties to the proceeding in the Court whose judgment is sought to be reviewed appear in the caption of the case. There is no parent or subsidiary company of any Party to be listed.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Table of Contents iii

Table of Citations v

Opinions Below 1

Statement of Jurisdiction 1

Statute Involved 1

Statement of the Case 5

Reasons for Granting the Writ 8

I. The Jurisdiction of the United States as conferred by the Rivers and Harbor Act of 1899, 33 U.S.C. 403 to regulate the navigable waters of the United States extends to the entire surface of a navigable body which shall include all of the land and water below the ordinary high water mark of such service or bed, however, may be limited by permitted manmade structures such as dikes 11

II. The Jurisdiction of the United States as conferred by the Clean Water Act, 33 U.S.C. 1311, 1319, and 1334, to regulate the waters of the United States does not extend to wetlands which constitute prior converted crop lands 12

III. A structure which is permitted pursuant to the Rivers and Harbor Act of 1899, 33 U.S.C. 403 and the Clean Water Act, 33 U.S.C. 1311, 1319, and 1334, may be repaired or rehabilitated without the necessity of obtaining the permission of the United States Government, if such structure is providing the service for which it was intended at the existent time .. 13

TABLE OF CONTENTS – Continued

Page

IV. The denial by the United States Government of a land owner's request to rehabilitate or reconstruct a structure located within the waters of the United States which had previously been permitted, constitutes a taking of the land owner's property without due process of law and therefore is in violation of the Fifth Amendment to the United States Constitution 14

TABLE OF CITATIONS

Page

CASES CITED:

Orleans Audubon Society vs. Lee, 742 Fed 2d 901 (Fifth Circuit, 1984) 9

The United States vs. Appalachian Power Company, 311 U.S. 377 (1940) 12

The United States vs. Defelice, 641 Fed 2d 1169 (Fifth Circuit, 1981) 9

The United States vs. Riverside Bay View Homes, 474 U.S. 121 (1985) 10, 14

The United States vs. Southern Investment Company, 876 Fed 2d 606 (Eighth Circuit, 1989) 9, 12

STATUTES CITED:

28 U.S.C. 1254 1

28 U.S.C. 1291 8

28 U.S.C. 1294 8

28 U.S.C. 1345 6

28 U.S.C. 1491 14

33 U.S.C. Section 401-467(n) 7

33 U.S.C. 403 ..... 2, 11, 13

33 U.S.C. 406 6

33 U.S.C. 1319 ..... 6, 12

33 U.S.C. Section 1251-1387 ..... 1, 8, 12

33 U.S.C. Section 1344 ..... 2, 7

TABLE OF CITATIONS – Continued

Page

OTHER AUTHORITIES CITED:

33 C.F.R. 323.4(a)(2) (Chapter II 7-1-92; 7-1-87) 3

33 C.F.R. Part 330 3

33 C.F.R. 330.03(b) 7

33 C.F.R. 329.11 ..... 3, 9, 11

33 C.F.R. 330 App. A(B)(3) (7-1-87) 5

Contents

APPENDIX

Memorandum Opinion filed October 22, 1996 in the United States Court of Appeals for the Sixth Circuit 1a

Memorandum & Order filed February 7, 1995 in the United States District Court for the Northern District of Ohio, Western Division 5a

Order filed November 21, 1994 in the United States District Court for the Northern District of Ohio, Western Division 9a

Memorandum & Order filed February 22, 1994 in the United States District Court for the Northern District of Ohio, Western Division 15a

Memorandum & Order filed July 27, 1993 in the United States District Court for the Northern District of Ohio, Western Division 26a

RGL 90-07 ..... 41a

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Howard W. Emery, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is reproduced in the Appendix filed herewith ("App.") at 1a. The unreported opinions of the district court in this case are reproduced at 5a and 16a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on October 22, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

403. The pertinent provision of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. Section 401-467 (n) and the Clean Water Act of 1977 as amended 33 U.S.C. Section 1251-1387 and the Regulations adopted by the Corps of Engineers relative to such statutes are set forth below:

> 403. *Obstruction of navigable waters generally; wharves; piers, etc; excavations and filings in:*

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building . . . of other structures in any . . . navigable river, or other water of the United States . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army.

33 U.S.C. 403.

1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act (33 U.S.C. 1312, 1316, 1317, 1328, 1342, 1344), the discharge of any pollutant by any person shall be unlawful.

1344. Permits for dredged or fill material

(e) General permits on State, regional, or nationwide basis. (1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section and (B) set forth the requirements and standards

which shall apply to any activity authorized by such general permit.

(f) Non-prohibited discharge of dredged or fill material. (1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material; (B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

33 U.S.C. 1344(e), 33 U.S.C. 1344(f)(2)(b)

323.4 Discharges not requiring permits

(2) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.

333 C.F.R. 323.4(a)(2) (Chapter II 7-1-92; 7-1-87)

323 Permits for Discharges of Dredged or Fill Material into Waters of the United States. (a) Certain discharges specified in 33 C.F.R., part 330 are permitted . . . If a discharge of dredged or fill material is not exempted by 323.4.

329.11 Geographic and jurisdictional limits of rivers and lakes.

(a) Jurisdiction over entire bed. Federal regulatory jurisdiction, and powers of improvement

for navigation, extend laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark. Jurisdiction thus extends to the edge (as determined above) of all such water bodies, even though portions of the water body may be extremely shallow, or obstructed by shoals, vegetation or other barriers. Marshlands . . . similar areas are thus considered navigable in law, but only so far as the area is subject to inundation by the ordinary high waters.

(1) The "ordinary high water mark" on nontidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving, changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.

B. Nationwide Permits.

3. Maintenance. . . . The repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill . . . currently serviceable means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction. This nationwide permit authorizes the repair, rehabilitation, or replacement of those structures destroyed by storms, floods, fire or other discrete events, provided the repair, rehabilitation,

or replacement is commenced or under contract to commence within a reasonable time of the date of their destruction or damage.

33 C.F.R. 330 App. A(B)(3) (7-1-87)

STATEMENT OF THE CASE

Howard W. Emery, a longtime resident of Northwest Ohio, bought property adjacent to the Portage River located in Northwest Ohio in April, 1993. Prior to Mr. Emery purchasing the property, Mr. Emery checked the status of the property with the local Zoning Commission and Health Department. Mr. Emery noted that the dikes which are the subject of this litigation were intact, and in fact, he drove upon such dikes. Mr. Emery contacted the United States Corps Of Engineers at its Cleveland Office and was told by an employee that as long as the dikes existed prior to 1968, he could repair and maintain the dikes pursuant to regulation without a permit. The Parties have stipulated, that the dikes were serviceable on the date that Mr. Emery purchased the subject property. Mr. Emery in the period 1983 through 1986 in fact maintained and repaired the dikes without a permit. In 1986 and 1987, the Portage River was at historically high levels. As a result, the dikes on Mr. Emery's property were overtopped. In April, 1987, Mr. Emery and two (2) other individuals, working part-time, utilized approximately 100 loads of material to repair any breaches in the dikes. The work was completed in approximately two (2) to four (4) months. Mr. Emery is a full-time employee of General Motors at its plant in Sandusky, Ohio.

The United States Government in the Summer of 1986, notified Mr. Emery that he would have to obtain the permission of the Corps of Engineers in order to repair and/or rehabilitate the dikes located on his property. The Corps asserted that the dikes had ceased to exist in the mid 70's and therefore were not a permitted structure. In addition, the Corps further asserted that in the Summer of 1986, the dikes had become so degraded and overtopped that repair and rehabilitation were not possible, and therefore, the dikes would have to be reconstructed. Mr. Emery and the Corps of Engineers had a number of discussions, wherein, Mr. Emery asserted that pursuant to statute and regulation, such permit was not necessary. The Corps has not adopted any administrative appeal procedure relating to its decision relative to the enforcement of the aforementioned statutes or regulations. Thus, Mr. Emery had no other alternative means to question the Corps' decision but to proceed with the repair. The Corps served upon Mr. Emery in April, 1987, a Cease and Desist Order. Mr. Emery ignored the Cease and Desist Order and proceeded to effectuate the repairs.

In 1991, the United States Government instituted an action against Mr. Emery to enjoin him from reconstructing the dikes, and further, from utilizing the land in proximity to the dikes without a permit. In addition, the Government sought a sizeable civil penalty. The District Court, had jurisdiction to hear the cause pursuant to 28 U.S.C. 1345, 33 U.S.C. 406, and 33 U.S.C. 1319. The Trial Court granted partial summary judgment on July 27, 1993. The Trial Court, found, that the Corps of Engineers had jurisdiction to regulate the Defendant's property pursuant to the Rivers and Harbors Appropriation Act of

1899, 33 U.S.C. Section 401, *et seq.* because the dikes in question were below the ordinary high water mark. The Trial Court found, that in determining the ordinary high water mark, one should calculate where the water of the navigable river would extend if the manmade structure did not exist. The Trial Court further found, that the Corps of Engineers had jurisdiction over the land which lies "behind" the dikes pursuant to the Clean Water Act of 1977, 33 U.S.C. 1344. The Trial Court therefore found that the deposit of materials "behind" the dikes was in violation of the law.

The matter proceeded to trial on the remaining allegations on October 28, 1993 and October 29, 1993. The Trial Court found, that the dikes were previously authorized pursuant to 33 C.F.R. 330.03(b). The Trial Court, found, however, that in 1986 and 1987, the dikes ceased to be serviceable. Thus, the Trial Court found, that Howard Emery could not repair, rehabilitate or reconstruct the dikes without obtaining the permission of the Secretary of the Army. The Trial Court further found, that the area "behind" the dike constituted wetlands and that it was not exempt from Regulation pursuant to Statute and Regulations. The matter was, continued for further hearing upon the question of remediation.

On November 21, 1994, the Trial Court ordered Howard Emery to breach the dikes which were the subject of the litigation, to cease and refrain from any activity in the area which would be inundated, and to remove all materials from the area to be inundated.

Howard Emery filed a Motion for a New Trial which was rejected on February 7, 1995. Howard Emery perfected an appeal in the United States Court of Appeals for

the Sixth Circuit pursuant to 28 U.S.C. 1291 and 28 U.S.C. 1294. On October 22, 1996, in an unreported per curiam decision, the Court of Appeals affirmed the decision of the Trial Court. The Court of Appeals adopted the reasoning and detailed written opinions issued by the Trial Court. Judge Harry W. Wellford concurred in part and dissented in part in relationship to said decision. Judge Wellford, although noting that the issue of the serviceability of the dike was a close question, and that he believed that Mr. Emery's work upon the dike was more akin to maintenance and repair than reconstruction, found, that such finding, did not constitute an abuse of discretion. Judge Wellford, however, could not accept, the conclusion of the Trial Court that the Corps of Engineers had jurisdiction over the land which lies "behind" the dike pursuant to the Clean Water Act of 1977. 33 U.S.C. 1251-1387.

REASONS FOR GRANTING THE WRIT

The Trial Court found, which was affirmed by the Court of Appeals, that in determining the jurisdiction of the United States Department of Army, Corps of Engineers pursuant to statute, that such jurisdiction extends to the ordinary high water mark, as such mark would exist if there were no manmade impediments. The Trial Court and Court of Appeals rejected Petitioner's argument that if the impediment is a permitted structure, that the ordinary high water mark and therefore the jurisdiction of the Corps must be determined in relationship to such impediment. It would appear, that such finding determines such issue for the first time in the United

States. The consequence of such finding is to bring within the jurisdiction of the United States Department of the Army vast areas of land located adjacent to navigable waters of the United States which historically have been diked. Further, such finding would appear to be in conflict with 33 C.F.R. 329.11 (1986 Final Rule) and the decision of the Eighth Circuit Court of Appeals in the *United States vs. Southern Investment Company*, 876 Fed 2d 606 (Eighth Circuit, 1989).

The Trial Court's decision, which was affirmed on appeal relative to the definition of serviceability appears to be in conflict with the decision rendered by the Fifth Circuit Court of Appeals in the *United States vs. Defelice*, 641 Fed 2d 1169 (Fifth Circuit, 1981). In *Defelice* (supra), the Court of Appeals defined serviceability as requiring the subject structure to provide the service for which it was intended at the existing time. The Fifth Circuit in *Defelice* (supra) was interpreting the Rivers and Harbor Act of 1899. The Fifth Circuit, adopted a similar definition in interpreting the Clean Water Act of 1977 in *Orleans Audubon Society vs. Lee*, 742 Fed 2d 901 (Fifth Circuit, 1984). The Court of Appeals for the Sixth Circuit, however, by adopting the Trial Court's opinion and reasoning defined serviceability pursuant to a regulation promulgated by the Corps of Engineers in 1992 and which appears at 33 C.F.R. Appendix B.2. The Trial Court's definition of serviceability requires the structure to be useable as is or with some maintenance, but is not so degraded as to essentially require reconstruction. Thus, the Fifth Circuit's focus is upon the issue of whether the structure is discharging the purpose for which it was constructed. The Sixth Circuit focuses upon whether the

structure needs to be reconstructed. In fact, the Trial Court found in favor of the Respondent and against the Petitioner upon the issue of reconstruction, because, the Trial Court found that the amount of material utilized evidenced more than mere repair. The Trial Court, in finding that the structure was a permitted structure, i.e. had existed since 1968, by definition concluded that it was discharging the purpose for which it was constructed.

Further, the rejection by the Trial Court of the Petitioner's Motion for a New Trial alleging that this action constitutes a taking of property without due process of law has grave import. The facts which are presented in this cause are distinguishable from the facts which were presented to this Honorable Court in *United States vs. Riverside Bay View Homes*, 474 U.S. 121 (1985). In *United States vs. Riverside Bay View Homes* (supra), the offending party was placing fill materials in a wetland in order to commence new construction. This Court, found, that the requirement that the land owner obtain a permit prior to such action, did not constitute a taking without due process of law, because the land owner had resort to a remedy in the United States Court of Claims. In the case at bar, the actions of the United States Government results, as the Trial Court found, that, the land of the Petitioner was rendered useless and fit for no reasonable purpose. Thus, the United States Government, in this cause, is taking land from the Petitioner and not merely denying the Petitioner the right to utilize said land in a particular manner.

This Court, therefore, should grant the Writ of Certiorari because a United States Court of Appeals has rendered an important decision in conflict with the decision of another United States Court of Appeals on the same matter. Further, by affirming the decision of the Trial Court, the United States Court of Appeals has departed from accepted usual course of judicial proceeding relative to the interpretation of Federal Statutes and Regulations as to require the exercise by this Court of its power of supervision.

I. The Jurisdiction of the United States as conferred by the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403 to regulate the navigable waters of the United States extends to the entire surface of a navigable body which shall include all of the land and water below the ordinary high water mark of such surface or bed, however, may be limited by permitted manmade structures such as dikes.

The Court of Appeals, by affirming the Trial Court's decision, held that the ordinary high water mark which defines the jurisdiction of the United States Government pursuant to the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, is determined by elevation. Such determination would appear to be in conflict with the Corps' own Regulation as set forth in 33 C.F.R. 329.11 (1986, Final Rule). Further, the Trial Court's decision requires such determination by resort to historical marks of the navigable waters in question. The Trial Court found that in making such a determination, one must disregard previously authorized structures. As previously stated, such decision would appear to be in conflict

with the Eighth Circuit's determination in *Southern Investment Company,* (supra) . More importantly, this decision will subject vast sections of the United States to Military Rule by bringing property under the supervision of the Corps of Engineers. This Court, has not determined the jurisdiction of the United States pursuant to the Rivers and Harbor Act of 1899 since 1940 (See *U.S. vs. Appalachian Power Company,* 311 U.S. 377 (1940). In addition, the decision of the Court of Appeals to bring vast sections of the United States under the supervision of the Corps of Engineers is such an important decision of Federal Law that only this Court should make such a determination.

II. The Jurisdiction of the United States as conferred by the Clean Water Act, 33 U.S.C. 1311, 1319, and 1334, to regulate the waters of the United States does not extend to wetlands which constitute prior converted crop lands.

The Trial Court rejected Petitioner's contention, that the Petitioner is exempt from the provisions of the Clean Water Act of 1977. 33 U.S.C. 1251-1387, because such land constitutes prior converted crop land. Prior converted cropland is land which has historically been manipulated to support farm crops and therefor under normal circumstances, will not support a prevalence of vegetation typically adapted for wetlands. Judge Wellford, agreed with the Petitioners. The lack of concise definition in relationship to this issue will subject vast sections of crop land in the United States to the whim of the Employees of the Department of the Army, because, this cause demonstrates that in an acrimonious situation such employees will disregard the pronouncements of their Supervisors.

In light of the refusal of the Corps of Engineers to adopt meaningful administrative reviews of its decisions, this Court in its supervisory capacity should more succinctly define this question of Federal Law.

III. A structure which is permitted pursuant to the Rivers and Harbor Act of 1899, 33 U.S.C. 403 and the Clean Water Act, 33 U.S.C. 1311, 1319, and 1334, may be repaired or rehabilitated without the necessity of obtaining the permission of the United States Government, if such structure is providing the service for which it was intended at the existent time.

Counsel has previously discussed the conflict between the Sixth Circuit and the Fifth Circuit relative to the definition of serviceability as it relates to the determination of the ordinary high water mark which is the defining issue as to the Government's jurisdiction pursuant to the Rivers and Harbors Appropriation Act of 1899. 33 U.S.C. 403. Thus, and upon flooding, vast sections of the United States will become subject to Governmental control. This Court, in order to resolve a conflict in its supervisory capacity, should interpret this important question of Federal Law. It has been, 56 years, since this Court has interpreted and defined the Government's jurisdiction pursuant to the Rivers and Harbor Act of 1899. 33 U.S.C. 403.

IV. The denial by the United States Government of a land owner's request to rehabilitate or reconstruct a structure located within the waters of the United States which had previously been permitted, constitutes a taking of the land owner's property without due process of law and therefore is in violation of the Fifth Amendment to the United States Constitution.

The issue which Petitioner asks this Court to review is distinguishable from the facts which lead to this Court's decision in *United States vs. Riverside Bay View Homes*, 474 U.S. 121 (1985). In that decision, this Court found that the requirement that an individual obtain a permit before engaging in a particular use of his property does not constitute a regulatory taking. Further, this Court likewise found in the *United States vs. Riverside Bay View Homes*, (supra) that even if there is a taking, that such taking should not be utilized to restrict implementation of an overall Government Plan to protect the environment. The Court's reasons, that pursuant to the Tucker Act 28 U.S.C., Section 1491, even if there is a taking, an individual may receive just compensation through proceedings in the United States Court of Claims. In this cause, at the Remediation Hearing, the Trial Court found that the action of the United States Government rendered the Petitioner's land useless. The Trial Court further found, that after the breaching of the dike, the Petitioner's land will not be able to be utilized for any other purpose. In this instance, the Petitioner submits that this Court should adopt an exception to *United States vs. Riverside Bay View Homes*, (supra) relating to Regulatory

actions which result in viable land being rendered untenable. The implementation of a regulatory scheme to protect the environment should not be financed by individuals such as the Petitioner, but should be funded by the United States Government. This issue is one of the interpretation of an important Federal question and should be decided only by this Court.

CONCLUSION

For the reasons stated the Petition for Certiorari should be granted.

Respectfully submitted,

CHARLES E. BLOOM
Attorney for Petitioner

APPENDIX TABLE OF CONTENTS

Memorandum Opinion filed October 22, 1996 in the United States Court of Appeals for the Sixth Circuit 1a

Memorandum & Order filed February 7, 1995 in the United States District Court for the Northern District of Ohio, Western Division 5a

Order filed November 21, 1994 in the United States District Court for the Northern District of Ohio, Western Division 9a

Memorandum & Order filed February 22, 1994 in the United States District Court for the Northern District of Ohio, Western Division 15a

Memorandum & Order filed July 27, 1993 in the United States District Court for the Northern District of Ohio, Western Division 26a

RGL 90-07 ..... 41a

APPENDIX

NOT RECOMMENDED FOR PUBLICATION

No. 95-3236

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)
Plaintiff-Appellee,	) **ON APPEAL FROM**
v.	) THE UNITED STATES DISTRICT COURT FOR
HOWARD W. EMERY,	) THE NORTHERN DISTRICT OF OHIO
Defendant-Appellant.	) **MEMORANDUM OPINION**
	) (Filed Oct. 22, 1996)

BEFORE: WELLFORD, NORRIS, and DAUGHTREY, Circuit Judges.

PER CURIAM. Defendant, Howard W. Emery, appeals from an order of the magistrate judge granting partial summary judgment to the United States, the judgment rendered by the magistrate judge following a bench trial, and the court's denial of defendant's motion for a new trial. The cause was submitted to the magistrate judge by consent of the parties, and arose out of the government's contention that defendant had violated provisions found in the River and Harbor Act of 1899, as amended, 33 U.S.C. §§ 401-467(n) and the Clean Water Act of 1977, as amended, 33 U.S.C. §§ 1251-1387.

Having had the benefit of oral argument, and having carefully considered the record on appeal and the briefs

of the parties, we are not persuaded that the magistrate judge erred in any of the particulars asserted by defendant.

Because the reasoning which supports the orders appealed from has been articulated by the magistrate judge, the issuance of a detailed written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the orders of the magistrate judge are **affirmed** upon the reasoning employed by that court in its Memorandum and Order filed on July 27, 1993, granting partial judgment, the Memorandum and Order filed on February 22, 1994, ordering that judgment on the issue of liability be granted to the government, and the Memorandum and Order filed on February 7, 1995, denying defendant's motion for a new trial.

HARRY W. WELLFORD, Circuit Judge, **concurring in part** and **dissenting in part**:

Howard Emery owns a parcel of real estate that is located on the banks of the Portage River in Port Clinton, Ohio and protected from the river by a dike. In 1987, Emery began a construction project that included a substantial refurbishing of the dike. In this lawsuit, the Army Corps of Engineers alleges that those activities, admittedly conducted without a permit, violated the Clean Water Act ("CWA") and the Rivers and Harbors Act of 1899 ("RHA"). The key issues in this appeal are: (1) whether the district court correctly ruled that the Corps has jurisdiction under the CWA and RHA to regulate Emery's construction activities; and (2) if so, whether the district court erred in concluding that Emery's work on

the dike was not exempt from the permit requirements of the CWA and RHA.

Emery's dike work was exempt from the permit requirements of the CWA and RHA so long as the structure was "currently serviceable" at the time of the refurbishing in 1987, which means that the dike must have been "useable as is or with some maintenance but not so degraded as to essentially require reconstruction." 33 C.F.R. § 330 App. A, B.2. The Corps concedes that the dike was currently serviceable when Emery purchased the property in 1983, and the district court found that, despite periodic inundation, the structure was intact and consistent as late as 1984. The court went on to find, however, that "an apparent breach" had developed near the center of the dike by 1986. Ultimately, the lower court concluded that the dike was not currently serviceable in 1987, holding that the fact that the structure had been overcome by water on a "perhaps predictable basis" since 1979 meant that it was not useable "as is or with some maintenance," and that the work done by Emery essentially constituted a "reconstruction" of the dike.

In my view, this is a very close question. The dike certainly *existed*, albeit in a degraded state, in 1987. Although the previous owner of the property, Gary Molnar, testified that the dike was not structurally sound,[1] the Corps investigator that deemed the dike

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[1] Molnar's testimony in this regard is contrary to that of the adjacent landowners, and, since Molnar had previously been involved in litigation with Emery, I construe his testimony to be hostile to Emery. Moreover, Molnar's testimony might have

unserviceable acknowledged that water levels in the Portage were historically high during the years immediately preceding 1987. This tends to undercut the district court's explanation for the periodic inundation of the land behind the dike. Moreover, in my view, Emery's dike work was probably more akin to maintenance and repair than reconstruction.

Despite these observations, I cannot say that the district court committed clear error in finding that the dike was not currently serviceable in 1987. Thus, I would **AFFIRM** on the issues that rest upon that determination. In contrast, I cannot accept the district court's conclusion that the area behind Emery's dike contains sufficient "hydric soils" to be deemed a "wetland" under the CWA. As a result, I **DISSENT** from the lower court's ruling as to the Corps' CWA jurisdiction in this case.

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been influenced by the fact that he was seeking a permit from the Corps at the time.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA, Case No: 3:91cv7172

Plaintiff

v. Memorandum & Order

HOWARD W. EMERY,

(Filed Feb. 7, 1995)

Defendant

This action is before the court on defendant's motion for a new trial. Defendant alleges that he is entitled to a new trial because the previous three orders of this court contain errors of law.[1] For the following reasons, defendant's motion shall be denied.

A court may grant a motion for a new trial under Fed. R. Civ. P. 59 if the verdict is against the weight of the evidence, *Hawley v. Dresser Industries, Inc.*, 958 F.2d 720, 725 (6th Cir. 1992), or there is a manifest error of law or fact, *Bell Tel. Labs., Inc. v. Hughes Aircraft Co.*, 73 F.R.D. 16, 20 (D.Del. 1976). Parties seeking a new trial are not permitted to introduce new evidence or legal theories which were available at the initial trial; if the party had an

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[1] In an order dated July 27, 1993, I granted partial summary judgment to the government (Doc. 40). After a two-day bench trial, I concluded, on February 22, 1994, that the government was entitled to prevail on the issue of liability (Doc. 62). As to relief, in an order dated November 21, 1994, I withheld the imposition of a fine pending restoration of the property to its original condition (Doc. 89).

opportunity to litigate those issues, it should not be permitted to prolong the litigation. *Id.*

According to defendant, this court should not have concluded as a matter of law that the Rivers and Harbors Act (RHA), 33 U.S.C. §§401 *et seq.*, gave plaintiff jurisdiction over the dikes and property behind the dikes. Defendant, pointing to affidavits submitted prior to my grant of partial summary judgment to the government, disputes my conclusion that judgment as a matter of law was warranted on the issue of RHA jurisdiction on the basis of defendant's failure to provide evidence that the Ordinary High Water Level (OHWL) did not lie behind the dikes.

This argument is based on a twisted reading of affidavits which were otherwise barren of any scientific evidence as to the OHWL. According to defendant, the government does not have jurisdiction over the dikes because they are not within the area bounded by the OHWL, and the OHWL is not behind the dikes because the water does not flow further up the shore because the dikes retard its flow.

The proper analysis, however, involves determining where the water would flow without the dikes, not where the water is actually found. In the absence of any evidence to contradict the government's evidence regarding the topography of the land behind the dikes and historic reach of the Portage River, defendant's argument and its supporting affidavits did not create a genuine issue of material fact which would have precluded summary judgment, nor does it currently provide a basis for a new trial.

Defendant, likewise, argues that a genuine issue of material fact existed as to the status of the "Large Dikes" which lie north of the dikes at the center of this litigation. Defendant alleges that he presented affidavits demonstrating that the "Large Dikes" were intact, serviceable, and not the subject of new construction.

The only affidavit mentioning the "Large Dikes" was that of Charles Hupp; he stated that these dikes were from seventy-five to ninety percent intact and serviceable from 1983 to 1986. (Doc. 36, ¶ 7). This evidence, however, only goes to the condition of the dikes, not whether defendant was engaged in any construction of new dikes. Because defendant did not respond to the government's claim that he built a new dike without a permit, he failed to carry his burden of designating specific facts which would raise a genuine of material fact; granting summary judgment, therefore, was not an error of law, and defendant is not entitled to a new trial on this issue.

Defendant further contends that this court erred in ruling that the area behind the dikes constituted "wetlands," a ruling allegedly contrary to the government's own interpretation of the law as pronounced in Regulatory Guidance Letter (RGL) 90-7. In his opposition to plaintiff's motion for summary judgment (Doc. 32), however, defendant neither argued that RGL 90-7 applied to the determination of the property's status, nor contested that the property was not a wetland. Defendant, therefore, is precluded from arguing the application of RGL 90-7, because parties moving for a new trial cannot advance new theories which they had the opportunity to litigate at trial. *See Bell Tel. Labs, supra,* 73 F.R.D. at 20.

Defendant's final argument alleges that the court erred when it created a remedial plan which would return the property to its natural state, rendering it useless to defendant. According to defendant, this constitutes a "taking" of his property without compensation in violation of the Fifth Amendment. Defendant, however, is not entitled to equitable relief enjoining the "taking" of his property because he can bring a suit for compensation against the government subsequent to the taking. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984). Defendant conceded this point in his Opposition to Plaintiff's Motion for Summary Judgment where he stated that this court did not have subject matter jurisdiction over defendant's claim for compensation. (Doc. 32, p. 10). Therefore, although defendant's property will be rendered useless, the Fifth Amendment prohibition against takings without compensation does not bar the imposition of this court's remedial plain.

For the reasons set forth above, it is

ORDERED THAT defendant's motion for new trial be denied.

So ordered.

/s/ James G. Carr
James G. Carr
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

United States of America,

Plaintiff

v.

Howard W. Emery,

Defendant

3:91CV7172

Order

(Filed Nov. 21, 1994)

This is a federal question case in which the government claimed that the defendant Howard Emery violated the Rivers and Harbors Act (RHA), 33 U.S.C. Sec. 401 *et seq.*, and the Clean Water Act, (CWA), 33 U.S.C. Sec. 1251 *et seq.*, by constructing a dike on property owned by him and located on the Portage River. Following a two day hearing, I concluded that the government was entitled to prevail on the issue of liability under the RHA and CWA. (Doc. 62).

Thereafter, a hearing was held on the issue of relief. The government initially proposed that the defendant be ordered to maintain the dike, but to conduct his activities to ensure that the land behind the dike was restored as wetland. At the remediation hearing, the government revised and reformulated its request, and asked the court "to order that the dike be breached, that all the junk, including those precast concrete blocks, be removed, and also the sump pump that is presently behind the dike also be removed" (Tr. 53).

In its post-hearing memorandum the government also asks that a substantial fine be imposed. (Doc. 84).

The defendant objects to imposition of any fine and asks, in essence, that the status quo be maintained. Alternatively, and in response to questions by the undersigned at the remedy hearing, the defendant, through counsel, expresses a willingness to reconstruct an adjacent dike (thereby enabling recreation of additional wetlands) while being permitted to maintain the dike that gave rise to this lawsuit.

Like other remedy proceedings, my authority in this case is "touch[ed] with equity." *United States v. Board of Trustees of Florida Comm. College,* 531 F. Supp. 267, 275 (S.D. Fla. 1981). To the extent that cases cited by the government, such as *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.,* 897 F.2d 1128 (11th Cir. 1990), point in the direction of a substantial fine, I conclude that those cases are distinguishable. Although this case involved impairment of a wetland, which constitutes serious misconduct on the defendant's part, it did not involve the kind of steady and repeated injury to the river that occurred with the effluent discharges in *Tyson.* 897 F.2d at 1130.

The Sixth Circuit, in *dicta,* disagreed with the holding in *Tyson* when it stated that it believed courts had correctly interpreted 33 U.S.C. §1319(d) to still allow discretion whether to impose fines at all. *U.S. v. Winchester Mun. Utilities,* 944 F.2d 301, 306 (6th Cir. 1991). The court based that opinion on the fact that courts had fashioned a number of different solutions without assessing severe penalties. *See Hawaii's Thousand Friends v. Honolulu,* 821

F.Supp. 1368 (D.Hawaii 1993) (maximum civil penalty of almost $250 million reduced to $918,000 after consideration of lack of quantifiable harm, absence of economic benefit and limited good faith efforts to comply); *U.S. v. Van Leuzen*, 816 F.Supp. 1171 (S.D.Tex. 1993) ($1 million penalty reduced to $4,200 per year for a minimum of eight years despite absence of any equities on defendant's behalf); *U.S. v. Confederate Acres S. & S. Drainage System*, 767 F.Supp. 834 (W.D.Ky. 1990) (imposing only a $17,000 penalty despite over four thousand violations over a twelve-year span, because defendant could not pay more and injunction would end the business); *U.S. v. Ohio Edison*, 725 F.Supp. 928, 934 (N.D.Ohio 1989).

Applying the factors which must be considered in determining civil penalties pursuant to 33 U.S.C. §1319(d), I conclude that initial assessment of a substantial fine would not be appropriate though the violation was serious and defendant did not act in good faith to comply with the regulations. Defendant has not enjoyed any economic benefit to this point based on his violation, and his property will have little value after it is restored to its wetland state pursuant to this order. In addition, defendant does not have a history of other violations, and the imposition of a fine would have a devastating impact on defendant's ability to restore the property to its rightful condition. Thus, in light of §1319(d)'s instruction to consider "other matters as justice may require," I choose not to impose a penalty at this time.

I shall retain jurisdiction over this matter and hold imposition of a fine in abeyance for a period of six months. At that time, the parties shall request such further action, if any, as they may believe to be appropriate.

If it appears that the letter or the spirit of this order – which seeks to accomplish restoration in due course of the area to wetland – is not being met by the defendant, I will give careful heed to the government's demand that a substantial fine be imposed. If the defendant shows good faith compliance with this order, the instinct to leniency that I exhibited at the remedy hearing will, in all likelihood, prevail. For now, however, and to ensure compliance with this order, the issue of the appropriate fine, if any, shall be kept open pending future developments.

My focus, accordingly, is on remediation, rather than punishment. Such a focus is appropriate, in lieu of a substantial fine, according to the terms of the statute. *See U.S. v. Key West Towers, Inc.*, 720 F.Supp. 963 (S.D.Fla. 1989) (after property restored to original condition, $250,000 penalty lifted if property donated to charitable organization); *U.S. v. Larkins*, 657 F.Supp. 76, 87 (W.D.Ky. 1987) ($40,000 penalty lifted if defendants completed ordered restoration plan).

The most appropriate course is that which the government outlined at the conclusion of the remedy hearing, and should include: 1) removal of all material, including construction material and equipment, pumps, and other items and materials, that have been introduced onto the property by the defendant, and presently are to be found in the area that is to be restored to wetland; 2) breaching the dike to enable water to flow without man-made impairment into the area behind the dike; and 3) cessation of any and all activities that either seek to, or reasonably can be foreseen as possibly having the purpose or consequence of restricting the flow of water onto, over, and away from the area to be restored as wetland.

The expense of these activities, which shall be undertaken forthwith, shall be borne by the defendant.

It is, accordingly,

ORDERED THAT:

1. The defendant shall forthwith:

   A) remove all material, including construction material and equipment, pumps, and other items and materials, that have been introduced by the defendant and presently are to be found in the area that is to be restored to wetland; once removed from that area, neither that nor any other similar material shall be introduced onto said property;

   B) breach the dike that is the subject of this litigation to enable water to flow freely and without further impairment into the area behind the dike; and

   C) cease and permanently desist and refrain from any and all activities that either seek to, or reasonably can be foreseen as having the purpose or consequence of unnaturally restricting the flow of water onto, over, and away from the area to be restored as wetland;

2) The parties shall on or before May 15, 1995, submit status reports or otherwise request such other action or relief as they shall deem appropriate at said time.

3) Imposition of a fine is held in abeyance pending further proceedings in this cause.

So ordered.

/s/ James G. Carr
James G. Carr
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

United States of America,
Plaintiff

v.

Howard W. Emery,
Defendant

91CV7172

Memorandum & Order

(Filed Feb. 22, 1994)

This is a federal question case in which the parties have consented to the entry of judgment by the undersigned pursuant to 42 U.S.C. §636(g). A two day bench trial was held on October 28 and 29, 1993. After completion of the proofs, the case was taken under advisement. Post-trial briefs were submitted. For the reasons that follow, I conclude that the government has met its burden of proof and judgment will accordingly be entered in its favor.

In 1983, defendant Howard Emery purchased from Gary Molnar a parcel of land located along the Portage River at 3502 West Harbor Road in Port Clinton, Ohio. In 1987, defendant was cited by the United States Army Corps of Engineers under the Rivers and Harbors Act (RHA), 33 U.S.C. §401 *et. seq.*, and the Clean Water Act (CWA), 33 U.S.C. §1251 *et seq.*, for constructing a dike on his property without obtaining permission from the Corps.

The parties have stipulated to several relevant facts. They do not dispute that defendant was in the process of

performing construction on a dike on the edge of his property along the Portage River in 1987. Further, they stipulate that defendant's predecessor owner, Gary Molnar, obtained a specific act permit on May 13, 1981, for construction of a small craft marina and reconstruction of an existing dike. They also agree that the dike was serviceable when defendant purchased it on April 6, 1983. Finally, it is undisputed that defendant received a cease and desist order on May 27, 1987, and Compliance Order on June 6, 1990.

At trial, plaintiff argued that in 1987, defendant violated the RHA and the CWA by performing unauthorized construction on a breached, overtopped dike on his property, causing effluent to be discharged into the river. Defendant argued that the construction was lawful because the RHA and CWA allow maintenance construction on serviceable structures without obtaining a permit.

The basis for the government's action to enforce the provisions of the RHA is defendant's admitted refusal to obtain a permit for the dike construction. Defendant claims his construction activity is exempted from the RHA by a nationwide permit (NWP) codified at 33 C.F.R. §330.5(a)(3), which reads:

> The repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill, or any currently serviceable structure or fill constructed prior to the requirement for authorization, provided such repair, rehabilitation, or replacement does not result in a deviation from the plans of the original structure or fill, and further provided that the structure or fill has not been put to uses differing

> from the uses specified for it in any permit authorizing its original construction. Minor deviations due to changes in materials or construction techniques and which are necessary to make repair rehabilitation or replacement are permitted.

Plaintiff argues that a deferential standard of review (i.e., an arbitrary and capricious standard) must be applied to the Corps' determination that defendant's dike construction was not covered by the NWP in 1987. Defendant, on the other hand, argues that he is entitled to *de novo* review and the government must prove its case by a preponderance of the evidence. I note that while the ultimate burden of proof lies with plaintiff, defendant has the burden of demonstrating that his conduct is covered by the NWP. Because I need not resolve the issue of the appropriate standard of review to decide this case, I assume that the Corps' determination is to be reviewed *de novo*.

Turning to the factual question of whether defendant's construction was covered under the nationwide permit codified at 33 C.F.R. §330.5(a)(3), and therefore exempt from the permit requirements of the RHA, defendant has stipulated that he bears the burden of proof. To be covered by the NWP, defendant must prove that the structure was previously authorized, currently serviceable at the time of construction, and being put to the same use as that specified in the original authorizing permit.

The first prong of the test for coverage under the NWP requires proof that the dike was "previously authorized." 33 C.F.R. §330.3(b) states:

> The following activities were permitted by nationwide permits issued on July 19, 1977, and unless modified do not require further permitting:
>
> > (b) Structures or work completed before December 19, 1968, or in waterbodies over which the district engineer had not asserted jurisdiction at the time the activity occurred provided, in both instances, there is not interference with navigation.

Mr. Frapwell of the Corps of Engineers testified that this NWP provision does not apply to structures that cease to exist. The parties have stipulated that the dike was serviceable and, by definition, in existence in 1983. The factual question is therefore whether the dike ceased to exist sometime thereafter, prior to the Corps' unserviceability determination in 1987.

The prior owner of the property, Mr. Molnar, testified that mere mud humps existed where a dike once was between 1978 and 1981. Government photographs taken in 1985, 1986 and 1987 (PLAINTIFF'S EX. 12-15) depict flooding in the area behind the dike. This evidence tends to suggest the dike ceased to exist after 1985.

As defendant pointed out on cross examination of plaintiff's witnesses, it is impossible to tell from the government's aerial photographs whether the dike had been ruined or whether it was merely overflowed on the day the photo was taken. Defendant offered substantial testimony from Mr. Vollmer, Mr. Karshuk, and Mr. Mathews, that the dike was a permanent fixture on the land from the 1950's to the present, though from time to time it would be overtopped by the river.

I find that plaintiff's assertion that the dike ceased to exist and therefore was not "previously authorized" within the meaning of the statute unsupported by the evidence. The evidence suggests that the dike did not completely cease to exist before the Corps made its determination that a construction permit was required. I conclude, accordingly, that the dike was an existing, previously authorized structure at that time.

The next question is whether the dike was "currently serviceable" when the cease and desist order was issued. Serviceability turns on factual questions similar to those above: whether the dike was serviceable and whether it ceased to exist are, however, separate questions. The term "currently serviceable" is not defined in the RHA, but is defined in the implementing regulation, 33 C.F.R. §330 App. A, B.2 as "useable as is or with some maintenance but not so degraded as to essentially require reconstruction."

The government introduced evidence that the dike on defendant's property was unserviceable and defendant was reconstructing it. Defendant testified during the government's case in chief that he purchased 2,000 pounds of crushed stone for dike enhancement between April 13, 1987, and November 19, 1987. Gary Molnar, from whom defendant purchased the property in 1983, testified that, in his opinion, the dike was not structurally sound. He stated he never farmed the land behind the dike, and his lawyer advised him to obtain a permit for construction on the dike while he owned it.

Gary Buck, a Corps of Engineers investigator, testified that he visited the property several times between

1980 and 1987 and concluded that the dike was unserviceable. On cross examination, however, Mr. Buck acknowledged that lake levels were historically high during 1986 and 1987. He further stated that although he observed the water levels above the dike, he did not conduct any comparative measurements of the water level.

Defendant offered the testimony of Mr. Karshuk, an owner of adjoining property. He testified that he was familiar with the property and the dike had been in existence for many years. Defendant also offered the testimony of Mr. Vollmer, another owner of adjoining property, who testified he visited the dike weekly prior to 1988 and the dike had "always been there." Another neighbor, Mr. Mathews, testified that he frequented defendant's property since 1955 to hunt fowl and vermin and had walked along the dike many times during that period.

The government introduced photographic evidence to demonstrate the unserviceable condition of the dike. Defendant's Exhibits 1 through 8 depict an intact dike above water between 1977 and 1984. Exhibit 12, taken in 1985, shows a consistent structure above water, though the area inside the dike is completely inundated. Exhibit 13, taken in 1986, also depicts a structure above water with an apparent breach near the center. Exhibit 14, taken in August, 1987, depicts a complete dike above the surface but surrounded by water. Exhibit 15 depicts the dike as construction was being performed in April 1987, and Exhibit 19 depicts the dike in November 1987, after construction had advanced further.

The government argues that its evidence demonstrates that in 1987, the dike was beyond ordinary repair and any construction on the dike could only be properly characterized as reconstruction. I agree. Both parties' photographic evidence indicates the Portage River has claimed and will continue to claim the area behind the dike if it is not properly maintained on a continued basis.

When defendant purchased the property in 1983, the dike was solid and the land behind it was dry. In August, 1984, and August, 1985, the river overcame the recently reconstructed dike and the entire plot behind it was completely inundated. (Govt. Exhibit #12 and 8). Photographs show that the land inside the dike had also been flooded years before Mr. Molnar's construction in 1983. (Plaintiff's Ex. 3 & 4).

Because the evidence clearly demonstrates the structure was, at least in the eight years preceding 1987, overcome by the river on a regular and perhaps predictable basis to the extent that the area behind it completely flooded, defendant's argument that the structure could have been used "as is or with some maintenance" is not well taken.

Taking the apparent structure of the dike prior to defendant's construction effort into account more specifically, the photographic evidence demonstrates the dike was breached and in need of more than simple repair or maintenance work. Government exhibit 13 depicts several clear breaches in the dike. The construction needed to allow the structure to serve its intended purpose, by holding back the river, would have been substantial. The

work defendant actually performed can be seen in Plaintiff's Exhibit 19. Comparing the condition of the dike in that photograph with Exhibit 13, taken before defendant began construction, demonstrates that defendant did more than repair or maintenance on the dike. It is apparent that he essentially reconstructed the dike.

Even considering the government's serviceability determination from a *de novo* standard, the defendant has not shown the dike was serviceable in 1987. Therefore, I conclude defendant's 1987 construction on the dike is not covered by the nationwide permit.

Turning to the government's claim under the Clean Water Act, it must first be noted that no nationwide permit is in effect which might apply to defendant. There are, however, two provisions which provide exemption from CWA permitting under limited circumstances.

The maintenance exemption provides:

> Maintenance, including emergency reconstruction of recently damaged parts, or currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope, or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption. 33 C.F.R. 323.4(a)(1)(ii)

Defendant's construction does not qualify under this exemption because, as set forth above, the dike was not

currently serviceable when he began construction. Furthermore, the work cannot qualify as emergency reconstruction because the evidence shows the river had started to overcome the dike in the years before 1987, so defendant's construction did not come within a reasonable period.

A second provision exempts from the permit requirements of the CWA work which is part of a farming operation:

> To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section . . . must be part of an established farming, silviculture or ranching operation. . . . Activities which bring an operation into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrologic regime are necessary to resume operations.

Again, it is defendant's burden to show he is covered by this exemption. There is photographic evidence demonstrating that the land inside the dike was sowed following defendant's construction of the dike and dredging of the area behind it. (Defendant's Ex. 20, 21) The photographs also show the land clearly was used for agricultural purposes in the 1960's (Defendant's Exhibit A, B) and even long before. However, photographic evidence shows the area behind the dike completely inundated during the growing seasons of 1981 through 1987. (Plaintiff's Ex. 4-8; 12-15)

Though those photographs only depict the area on the days they were taken, no evidence was submitted to suggest that defendant was attempting to farm the land during that time. Defendant has not met his burden, as required to meet the statutory exemption, of demonstrating that the 1987 construction was part of an ongoing farming operation.

Additionally, even if he had shown a continuing effort to farm the land, it is apparent from photographs of the dike area in the years immediately preceding construction that modifications to the hydrologic regime were necessary to resume farming operations. It appears from photographic evidence, as mentioned above, that the "hydrologic regime" of the area has been primarily dictated by the ebb and flow of the Portage River absent ongoing dike maintenance.

The testimony of Mr. Brewer provided further support for the government's claim that defendant's farming activity was a significant departure from the area's prevailing hydrologic regime. He characterized the dike area as a "wetland," and the soil behind it as "hydric soil." Hydric soil, according to Mr. Brewer, requires periodic inundation to maintain its natural water balance. He also said the root systems of plants indigenous to hydric soil are different from those defendant planted after he pumped the dike area dry. It is clear from Mr. Brewer's testimony that defendant could not have resumed farming that land without substantially modifying its prevailing hydrologic regime.

Defendant's dike construction violated the RHA and was not covered by the nationwide permit under the

RHA because the dike was not serviceable. Furthermore, the construction violated the CWA and did not fall within its two narrow exemptions for maintenance or farming.

For the reasons stated above,

IT IS ORDERED THAT judgment on the issue of liability be granted for plaintiffs.

So ordered.

/s/ James G. Carr
United States Magistrate
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

United States of America,
Plaintiff

v.

Howard W. Emery,
Defendant

91CV 7172

Memorandum & Order

(Filed Jul. 27, 1993)

This is a federal question case in which the parties have consented to the entry of judgment by the undersigned pursuant to 28 U.S.C. §636(c). Pending is plaintiff's motion for summary judgment. For the reasons stated below, plaintiff's motion shall be granted in part and denied in part.

Plaintiff alleges that defendant violated the Rivers and Harbors Act of 1899 (RHA), 33 U.S.C. §401 *et seq.*, and Clean Water Act (CWA), 33 U.S.C. §1251 *et seq.*, by constructing dikes on the Portage River and draining, filling, and cultivating the land behind the dikes. Specifically, plaintiff alleges that in 1987, defendant rebuilt a partially breached and overtopped dike on the Portage River without obtaining a permit from the Army Corp of Engineers. Plaintiff also alleges that in 1988, defendant constructed a new section of dike adjacent to the rebuilt dike and placed fill in the area behind the dikes, which had previously been wetlands.

Defendant contends that no permit was necessary because the property is not subject to the jurisdiction of the Army Corp of Engineers pursuant to the RHA and the

CWA. Defendant contends further that even if the property is subject to regulation under the RHA and the CWA, he was not required to obtain a permit before working on the existing dike because both Acts allow for the maintenance of serviceable structures without obtaining a permit. Plaintiff has moved for summary judgment on the ground that there is no genuine issue of material fact.

SUMMARY JUDGMENT STANDARD

As a preliminary matter, defendant mischaracterizes his burden on summary judgment. Defendant states that the "new era" of summary judgment practice "does not obviate the Plaintiff from ultimately demonstrating that no genuine dispute exists as to any material fact" (Doc. 32, pg. 14). He states further that the "new era" cases merely clarified the old summary judgment standard. *Id.* This is not the case.

The principal purpose of summary judgment "is to isolate and dispose of factually unsupported claims and defenses." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Pursuant to Fed. R. of Civ. P. 56(c), the moving party bears the initial burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. However, "when the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

Fed. R. of Civ. P. 56(e) places responsibility on the party against whom summary judgment is sought to

demonstrate that summary judgment is improper, either by showing the existence of a material question of fact or that the underlying substantive law does not permit such a decision. Further, Rule 56(e) requires the non-moving party to go beyond the pleadings, and by affidavits, depositions, answers to interrogatories, or admissions on file, designate specific facts showing a genuine issue for trial. *Id.* at 324; *Cincinnati Newspaper Guild, Local 9 v. Cincinnati Enquirer, Inc.*, 863 F.2d 439, 441 (6th Cir. 1988).

To determine which facts are material, a court must look to the substantive law to be applied. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the dispute about a material fact is genuine, *i.e.*, if the evidence is such that a reasonable jury could return a verdict for the non-moving party, summary judgment should be denied. *Id.* "In deciding a motion for summary judgment a court may not resolve conflicts in the evidence or make credibility determinations; the evidence of the non-movant is to be taken as true and all justifiable inferences drawn in his or her favor." *Id.* at 255 (citing *Addickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)).

JURISDICTION UNDER THE RHA

Plaintiff alleges that defendant violated §10 of the RHA, which states:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven,

> harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning same.

33 U.S.C. §403. Pursuant to this section, the Army Corp of Engineers (the Corp) has the power to regulate all navigable waters, defined as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. §329.4. The Corp's jurisdiction extends:

> laterally to the entire water surface and bed of a navigable water body, which includes all the land and water below the ordinary high water mark. Jurisdiction thus extends to the edge (as determined above) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation or other barriers. Marshlands and similar areas are thus considered navigable in law, but only so far as the area is subject to inundation by the ordinary high waters.

33 C.F.R. §329.11(a).

Defendant does not contest the government's assertion that the Portage River is a navigable body of water (Doc. 32, pg. 9). Consequently, defendant does not dispute the Corp's ability to regulate his dikes, which protrude into the river.

Defendant does dispute, however, the government's assertion that the Corp has jurisdiction to regulate the area behind the dikes. Defendant argues that because the ordinary high water level is east, rather than west, of the dikes, the Corp lacks jurisdiction. Defendant's argument lacks merit, however, because the evidence demonstrates that the ordinary high water level (OHWL) lies behind defendant's dikes.

The OHWL of a non-tidal river is determined by:

> the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of the soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.

33 C.F.R. §329.11(a)(1). Plaintiff provides the uncontradicted affidavit of Gary Buck, who states that based on a "review of the U.S. Geological Survey Topographical Maps, aerial photographs, and on-site observation," the property behind defendant's dikes is below the OHWL (Doc. 30, Exh. 2). Additionally, defendant admits that the land behind his dikes is below the level of the Portage River and if it were not for the dikes, the property at issue would be inundated (Doc. 32, pg. 35). Based on these statements, it is evident that defendant's property is

below the OHWL. Consequently, the Corp has jurisdiction to regulate the property behind defendant's dikes pursuant to 33 C.F.R. §329.11.

JURISDICTION UNDER THE CWA

Plaintiff also alleges that defendant violated §404 of the CWA, 33 U.S.C. §1344. Pursuant to that section, the Corp has the power to regulate the discharge of dredged or fill material into the navigable waters of the United States. The scope of the term "navigable waters" as used in the CWA, however, is broader than under the RHA. For purposes of the CWA, navigable waters are defined as "waters of the United States, including the territorial seas." 33 U.S.C. §1362(7).

"Waters of the United States" has been defined by administrative regulation to include:

> (a)(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.
>
> (b) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

> (c) The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands"

33 C.F.R. §328.3.

As stated previously, defendant does not contest the Corp's jurisdiction over the Portage River. Defendant. does, however, contest the Corp's ability to regulate the property behind his dikes under the CWA. In support of jurisdiction over the area behind the dikes, the government provides the affidavit of Douglas Brewer, a biologist, who states that "the area behind the dikes is an area that when inundated or saturated by surface or ground water at a frequency or duration sufficient to support a prevalence of hydrophytic vegetation will, in fact, support such vegetation" (Doc. 30, Exh. 6). Mr. Brewer goes on to state that "based on Soil Conservation Service soils maps for Ottawa County, hydric soils exist in the diked area. The area, therefore, satisfies the definition of wetland as embodied in 33 C.F.R. 328.3(b)." *Id.*

The permit issued to defendant's predecessor in interest, Gary Molnar, on which defendant relies, states that the area behind the dikes is "an existing wetland" (Doc. 32, Exh. B). Defendant has not presented any material in opposition to this finding and the affidavit of Mr. Brewer. Consequently, the Corp has jurisdiction over the area behind the dikes pursuant to the CWA.

WORK ON THE EXISTING DIKE

Plaintiff alleges that defendant violated 33 U.S.C. §§403, 1311, and 1344 by maintaining and repairing the existing dike without obtaining a permit from the Corp. Defendant does not contest plaintiff's assertion that he performed work on the dike without a permit sometime in early 1987. Rather, he alleges that a permit was not necessary.

Defendant contends that the work he performed on his existing dike falls under the CWA exception allowing him to discharge dredged or fill material without a permit for the purpose of "maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures." 33 U.S.C. §1344(f)(1)(B).

Alternatively, defendant contends that the work he performed was covered by a nationwide permit authorizing maintenance, defined as "the repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill" or of any currently serviceable structure or fill completed before 1968. 33 C.F.R. §330, Appendix A, B.3., and §330.4.

In May, 1981, defendant's predecessor in interest, Gary Molnar, obtained a permit to reconstruct a dilapidated dike to be used as part of a proposed marina (Doc. 32, Exh. B). Plaintiff's biologist, Douglas Brewer, states in his affidavit that "between July of 1981 and July of 1982 dikes were constructed where only mud humps previously existed as per DA Permit 80-002-6" (Doc. 30, Exh.

6). This testimony is supported by an aerial photograph taken in July, 1982, which shows what appears to be a newly constructed dike along the eastern end of defendant's property (Doc. 31, Exh. 20). As long as this dike was serviceable, defendant retained the right to maintain it without a permit pursuant to either the exception to the CWA or the nationwide permit. *See* 33 U.S.C. §1344(f)(1)(B), and §330, Appendix A, B.3.

Plaintiff asserts that the maintenance exception to the CWA and the nationwide permit do not apply to defendant because his dike was not currently serviceable at the time the work began. The term "currently serviceable" is not defined in the CWA or its implementing regulations. However, the regulation containing the nationwide permit defendant seeks to rely on defines "currently serviceable" as, "useable as is or with some maintenance, but not so degraded as to essentially require reconstruction." 33 C.F.R. §330, Appendix A, B.2.; *See United States v. DeFelice*, 641 F.2d 1169 (5th Cir. 1981); Webster's Third New International Dictionary 2075 (1976).

Plaintiff contends that when defendant purchased the property in 1983, the dike was breached and the area behind the dike was inundated; therefore the dike was not currently serviceable. In support of this contention, plaintiff provides aerial photographs taken during the period from July 1982, through August 1987, which show that the area behind defendant's dike was covered by water (Doc. 31, Exh. 20, 23-26). Additionally, Douglas Brewer states in his affidavit that the area behind defendant's dike was inundated by August of 1985 and that the dike was completely overtopped by August of 1986 (Doc. 30, Exh. 6).

In contrast, defendant provides that affidavit of Charles Hupp, who states that he fished from the dike on defendant's property from approximately 1983 through 1986 (Doc. 32). Mr. Hupp testifies that during that time period, the dike at issue was "approximately seventy-five (75%) to ninety percent (90%) in-tact." *Id.* Defendant also provides the affidavit of Carl Mathews, who states that he hunted and fished on defendant's property from approximately 1955 through 1990, and that during that time "both dikes were serviceable in that they were accomplishing the purpose for which they were intended" (Doc. 32).

A genuine issue of material fact exists as to whether the dike was serviceable at the time defendant began work in 1987. Defendant correctly states that the aerial photographs merely depict that the area behind the dike was inundated on the day the picture was taken. They do not demonstrate that the dike was unserviceable, i.e. so degraded that it essentially required reconstruction.

Moreover, defendant correctly states that the conflict between the affidavit of Mr. Brewer and the affidavits of Mr. Hupp and Mr. Mathews cannot be resolved on summary judgment. Consequently, plaintiff is not entitled to summary judgment on Count One of its complaint or the portion of Count Four of its complaint that alleges that the work performed on defendant's existing dike violated the RHA.[1]

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[1] If the work defendant performed was covered under the nationwide permit, he would be in compliance with both the CWA and the RHA.

CONSTRUCTION OF A NEW DIKE

Plaintiff also contends that defendant violated 33 U.S.C. §§403, 1311, and 1344 by constructing a new dike adjacent to the existing dike without a permit. Gary Buck states that "on September 16, 1988, I did and (sic) aerial inspection of the site and took photographs (exhibit 15) and on October 20, 1988, I did a ground level inspection and took photographs (exhibit 15a). Those inspections revealed that Mr. Emery commenced work on a new section of the dike" (Doc. 30, Exh. 2). The photographs Mr. Buck refers to depict a piece of heavy construction equipment positioned on a partially completed dike (Doc. 31, Exh. 15, 15a).

In his answer to plaintiff's complaint, defendant simply denies the allegation that he constructed a new dike without a permit (Doc. 8, pg. 3). He has not, however, provided any specific facts in response to plaintiff's motion for summary judgment. Rule 56(e) requires that once the moving party has made an initial showing that it is entitled to summary judgment, the non-moving party must to go beyond the pleadings, and by affidavits, depositions, answers to interrogatories, or admissions on file, designate specific facts showing a genuine issue for trial.

Defendant has not responded to plaintiff's claim that he built a new dike adjacent to his existing dike without a permit. Consequently, plaintiff is entitled to summary judgment on Count Two of its complaint, alleging that defendant constructed a dike in violation of the CWA, and the portion of Count Four of the complaint that states that defendant violated the RHA by constructing a new dike.

DEPOSITING FILL IN THE AREA BEHIND THE DIKES

Finally, plaintiff alleges that defendant violated the CWA and the RHA by depositing fill in the area behind the dikes without a permit for purposes of building a roadway. Gary Buck states in his affidavit that based on his observations in the fall of 1988, defendant had "placed fill in the previously inundated area behind the dike for a roadway" (Doc.30, Exh. 2). Mr. Buck also states that:

> On October 12, 1989, I performed an on site inspection of the property in the presence of Mr. Emery and took photographs (exhibit 15b). During that inspection, I observed that fill was placed in several areas inside the dike previously inundated and in areas immediately adjacent to the Portage River that were wetlands as defined in 33 C.F.R. 328.3(b). When asked who had placed the fill, Mr. Emery stated that he had.

Id. Mr. Buck goes on to state that June 1990, and November 1991, inspections revealed that defendant was maintaining the fill in place and had planted a crop of wheat.[2] *Id.*

The photographs taken by Mr. Buck in October of 1989, reveal that defendant constructed a road and a pole barn on the property behind the dikes (Doc. 31, Exh. 15b).

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[2] Plaintiff's complaint does not allege that depositing fill on the property behind the dike for purposes of farming and planting the property with wheat violates the CWA and the RHA. Plaintiff alleges only that depositing fill for purposes of building a road is a violation of the Acts.

Additionally, the road is clearly visible in aerial photographs taken by Mr. Buck on June 7, 1990 (Doc. 31, Exh. 16).

Defendant does not contest that he built the road. He does, however, contend that his activity is permitted pursuant to an exemption. Plaintiff correctly states that the RHA does not contain any exemptions. Consequently, because defendant did not obtain a permit to deposit fill for the purpose of building a road on the property behind the dike, he is in violation of the RHA.

Unlike the RHA, the CWA contains exceptions to the permit requirement. Defendant contends that his discharge of fill material into the wetland behind the dikes in order to build a road is covered by a CWA provision exempting discharge "from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices." 33 U.S.C. §1344(f)(1)(A). Pursuant to the regulation implementing this exception, a property owner can construct a farm road on his wetland without obtaining a permit if he complies with several detailed conditions regarding the construction of the road, its placement, and other matters effecting the character of the wetland. 33 C.F.R. §323.4(a)(6).

Defendant does not contest the plaintiff's assertion that he bears the burden of proving that his conduct falls within the exceptions to the CWA. (Doc 32, pg. 39); *United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986). However, he has not come forward with any information indicating that his road falls within the exemption, i.e. material

showing that the road is of appropriate length and width, was not constructed in areas inhabited by wetland fowl, shellfish, and vegetation, and was not constructed of unsuitable material. *See* 33 C.F.R. §323.4(a)(6)(i) through (xv). Consequently, I must find that defendant's road does not come within the exception.

Even if defendant's road was covered by the exception for normal farming activity, defendant would still have to prove that it was not subject to recapture under 33 U.S.C. §1344(f)(2), which states that:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced, shall be required to have a permit under this section.

Defendant has not contended that any part of his property has previously been used as a road. Building a road on the property would constitute a new use of that portion of the property, thereby bringing the activity back under the statute and requiring defendant to obtain a permit before constructing the road. Consequently, plaintiff is entitled to summary judgment on its claims that defendant's road violates the CWA and the RHA.

For all the foregoing reasons, it is therefore

ORDERED THAT plaintiff's motion for summary judgment shall be granted as to Counts Two and Three of its complaint, as well as the parts of Count Four dealing with the construction of the new dike and the road, and

denied as to Count One and the part of Count Four dealing with the existing dike.

So ordered.

/s/ James G. Carr
United States Magistrate Judge

RGL 90-07

Clarification of the Phrase "Normal Circumstances" as it pertains to Cropped Wetlands.

Issued 9/26/90 Expires 12/31/93

1. The purpose of this regulatory guidance letter (RGL) is to clarify the concept of "normal circumstances" as currently used in the Army Corps of Engineers definition of wetlands (33 CFR 328.3(b)), with respect to cropped wetlands.

2. Since 1977, the Corps and the Environmental Protection Agency (EPA) have defined wetlands as:

"areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions . . . " (33 CFR 328.3(b)) (emphasis added).

While "normal circumstances" has not been defined by regulation, the Corps previously provided guidance on this subject in two expired "normal circumstances" RGLs (RGLs 82-2 and 86-9). These RGLs did not specifically deal with the issue of wetland conversion for purpose of crop production.

3. When the Corps adopted the Federal Manual for Identifying and Delineating Jurisdictional Wetlands (Manual) on 10 January 1989, the Corps chose to define "normal circumstances" in a manner consistent with the definition used by the Soil Conservation Service (SCS) in its administration of the Swampbuster provisions of the Food Security Act of 1985 (FSA). Both the SCS and the Manual interpret "normal circumstances" as the soil and

hydrologic conditions that are normally present, without regard to whether the vegetation has been removed [7 CFR 12.31(b)(2)(i)] [Manual page 71].

4. The primary consideration in determining whether a disturbed area qualifies as a section 404 wetland under "normal circumstances" involves an evaluation of the extent and relative permanence of the physical alteration of wetlands hydrology and hydrophytic vegetation. In addition, consideration is given to the purpose and cause of the physical alterations to hydrology and vegetation. For example, we have always maintained that areas where individuals have destroyed hydrophytic vegetation in an attempt to eliminate the regulatory requirements of section 404 remain part of the overall aquatic system, and are subject to regulation under section 404. In such a case, where the Corps can determine or reasonably infer that the purpose of the physical disturbance to hydrophytic vegetation was to avoid regulation, the Corps will continue to assert section 404 jurisdiction.

5. The following guidance is provided regarding how the concept of "normal circumstances" applies to areas that are in agricultural crop production:

a. "Prior converted cropland" is defined by the SCS (Section 512.15 of the National Food Security Act Manual, August 1988) as wetlands which were both manipulated (drained or otherwise physically altered to remove excess water from the land) and cropped before 23 December 1985, to the extent that they no longer exhibit important wetland values. Specifically, prior converted cropland is inundated for no more than 14 consecutive days during the growing season. Prior converted cropland generally

does not include pothole or playa wetlands. In addition, wetlands that are seasonally flooded or ponded for 15 or more consecutive days during the growing season are not considered prior converted cropland.

b. "Farmed wetlands" are wetlands which were both manipulated and cropped before 23 December 1985, but which continue to exhibit important wetland values. Specifically, farmed wetlands include cropped potholes, playas, and areas with 15 or more consecutive days (or 10 percent of the growing season, whichever is less) of inundation during the growing season.

c. The definition of "normal circumstances" found at page 71 of the Manual is based upon the premise that for certain altered wetlands, even though the vegetation has been removed by cropping, the basic soil and hydrological characteristics remain to the extent that hydrophytic vegetation would return if the cropping ceased. This assumption is valid for "farmed wetlands" and as such these areas are subject to regulation under section 404.

d. In contrast to "farmed wetlands", "prior converted croplands" generally have been subject to such extensive and relatively permanent physical hydrological modifications and alteration of hydrophytic vegetation that the resultant cropland constitutes the "normal circumstances" for purposes of section 404 jurisdiction. Consequently, the "normal circumstances" of prior converted croplands generally do not support a "prevalence of hydrophytic vegetation" and as such are not subject to regulation under section 404. In addition, our experience and professional judgment lead us to conclude that because of the magnitude of hydrological alterations that

have most often occurred on prior converted cropland, such cropland meets, minimally if at all, the Manual's hydrology criteria.

e. If prior converted cropland is abandoned (512.17 National Food Security Act Manual as amended, June 1990) and wetland conditions return, then the area will be subject to regulation under section 404. An area will be considered abandoned if for five consecutive years there has been no cropping, management or maintenance activities related to agricultural production. In this case, positive indicators of all mandatory wetlands criteria, including hydrophytic vegetation, must be observed.

f. For the purposes of section 404, the final determination of whether an area is a wetland under normal circumstances will be made pursuant to the 19 January 1989 Army/EPA Memorandum of Agreement on geographic jurisdiction. For those cropped areas that have previously been designated as "prior converted cropland" or "farmed wetland" by the SCS, the Corps will rely upon such a designation to the extent possible. For those cropped areas that have not been designated "prior converted cropland" or "farmed wetland" by the SCS, the Corps will consult with SCS staff and make appropriate use of SCS data in making a determination of "normal circumstances" for section 404 purposes. Although every effort should be made at the field level to resolve Corps/SCS differences in opinion on the proper designation of cropped wetlands, the Corps will make the final determination of section 404 jurisdiction. However, in order to monitor implementation of this RGL, cases where the Corps and SCS fail to agree on designation of prior

converted cropland or farmed wetlands should be documented and a copy of the documentation forwarded to CECW-OR.

6. This policy is applicable to section 404 of the Clean Water Act only.

7. This guidance expires 31 December 1993 unless sooner revised or rescinded.